IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

 No. 323

EDWARD H. COOLIDGE, JR.,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR PETITIONER

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INDEX

CITATIONS

Cases:

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OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire affirming the conviction of petitioner of first degree murder (App. 262-286) is reported 109 N.H. 403, 260A2d 547. Earlier opinions denying motions to suppress evidence obtained by unlawful search and seizure and for pre-trial discovery (App. 205, 207) are reported 106 N.H. 186, 208 A2d 322 and 106 N.H. 229, 208 A2d 832.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on June 30, 1969 (App. 262).[1] A timely motion for rehearing was denied, with a minor amendment to the opinion, on July 30, 1969 (App. 287-288). By order of Mr. Justice Brennan dated October 10, 1969, the time for filing a petition for certiorari was extended to and including November 26, 1969. The petition was filed on November 22, 1969 and granted upon June 29, 1970 (App. 289).

The jurisdiction of this Court is based upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether a search warrant issued by the State Attorney General upon the unsworn reports of his subordinates while he is in active charge of the investigation and prosecution of a highly-publicized murder satisfies the requirements of the Fourth and Fourteenth Amendments.

2. Whether a wife's acquiescence in the search and seizure of her husband's guns and clothing, while he is in custody, validates a search and seizure otherwise violating the Fourth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or af-

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[1] Under New Hampshire practice the opinion of the Supreme Court ending in the notations "exceptions overruled", along with the denial of the motion for rehearing, constitutes the judgment.

firmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner was convicted of murder in the Superior Court of Hillsborough County, New Hampshire (App. 259-260). Petitioner's exceptions were overruled on appeal (App. 262-286). The questions presented are best understood after a brief chronology of events.

Pamela Mason, a 14 year-old girl, left her home in Manchester, New Hampshire, about 6:00 p.m. on January 13, 1964, during a heavy snow storm, apparently in response to a man's telephone call for a babysitter. She disappeared for eight days. On January 21, 1964, her body was found on the west side of Interstate Highway 93, a modern, high-speed highway with an open median strip running south to eastern Massachusetts cities. She had died from gunshot and knife wounds, probably about two to four hours after her last meal. (App. 262-266.)

The State's theory was that the decedent had been killed with a .22 caliber Mossberg rifle and her body thrown or left by the highway sometime around 9:00 p.m. on January 13. The body was not discovered until after a rain storm on January 20-21 melted the snow. (App. 265-266.)

The case stirred wide publicity approaching hysteria, especially because an unsolved kidnapping and murder of another young girl, Sandra Valade, had occurred in Manchester four years before. New Hampshire's Attorney General William Maynard took active charge of the investigation and any subsequent prosecution (App. 61-62, 188, 203). The police appealed to the public via newspaper and radio for reports of any persons who were out that night.

On January 28, having learned from a neighbor that petitioner was out of his house, two police officers went to petitioner's residence and questioned him about his activities on the evening of Pamela Mason's disappearance. Coolidge showed the officers his guns. (App. 111-112.) The officers inspected his automobiles, both registered in his own name (App. 178-179, 186, 188). As they left, one of the officers asked Coolidge whether he would be willing to take a lie detector test. Coolidge replied that Sunday was a preferable date. Mrs. Coolidge was present off and on during the interview (App. 100, 112).

On Sunday, February 2, 1964, Coolidge was called to the Manchester Police Station to arrange a lie detector test (App. 112). For about two hours, Manchester police officers tried to persuade him to take the test (App. 26-27). About 3:00 or 3:30 p.m. two officers who were strangers to Mrs. Coolidge picked her up at the Coolidge home and took her to the police station where she talked briefly with her husband (App. 91).

As Mrs. Coolidge was leaving the station, she was approached by Captain Stips, who was in charge of the investigation into the Mason murder. Captain Stips questioned Mrs. Coolidge about her conversation with her husband and then about her husband's involvement in the Mason murder. Captain Stips then asked Mrs. Coolidge whether she and her husband were "compatible". He urged her to "cooperate with the police", and said that if she "withheld any information he could give me a prison sentence". (App. 70-71, 92, 200.) Mrs. Coolidge was so upset by the questioning that she "could just barely drive home" (App. 92).

Coolidge himself was taken to State Police Headquarters in Concord, New Hampshire for the lie detector test. The test proved inconclusive but, while it was in progress, Coolidge admitted embezzling money from his employer (App. 185). On the way back to Manchester petitioner was warned of his rights, and the police decided to hold him in custody (App. 29, 66, 185). He was then interrogated until about 2:30 or 3:00 a.m. the next morning with only an hour's interruption (App. 30-31). He steadfastly denied involvement in the Mason crime but gave a number of conflicting explanations (Transcript of Trial, vol. 5, pp. 4-6, 18, 66, 74-78).

About 10:30 p.m. that same evening, while petitioner was held at the Manchester police station, the Manchester police decided once again to question Mrs. Coolidge. Detective Sergeant McBain of the New Hampshire State Police and Inspector Glennon of the Manchester Police Department went to the Coolidge home (App. 33), title to which was held by petitioner (App. 21-22). Mrs. Edward Coolidge, Sr., petitioner's mother, was present and also Maria, the couple's minor daughter. The police officers instructed Mrs. Coolidge, Sr. to leave the house (App. 110). Once they had Mrs. Coolidge alone, the police officers told her that her husband was "in serious trouble" and would not be home that night (App. 93). They then quizzed her about her husband's whereabouts on the night of the Mason murder and asked whether her husband had any firearms (App. 93). Mrs. Coolidge said yes. She went into the bedroom, followed by the police officers without invitation (App. 94). The firearms were in a bedroom closet (App. 94). Mrs. Coolidge took the weapons from the closet (App. 94). The officers then asked whether or not the clothes worn by petitioner on the night of January 13, 1964 were available. Mrs. Coolidge pointed out some of the clothes which her husband might have been wearing that night. (App. 94-95.) The officers took two shot guns, a Marlin rifle and a Mossberg rifle, some trousers and a jacket from the house, giving a receipt for the items (App. 175). On the way out

they told Mrs. Coolidge that they wished to inspect petitioner's two cars. She neither objected nor assented but, supposing herself to have no choice, gave the police officers the keys to the cars (App. 186-187, 197). Mrs. Coolidge remained in the house. After a search the police officers took a pair of trousers, a wool cap, a coat hanger, a glove, a paring knife and a box of bullets (App. 173-174). They, like the guns, trousers and jacket taken from the house, were petitioner's personal property, as distinguished from common household goods. Petitioner had not authorized his wife to show or give them to the police or to dispose of them in any way (App. 189, 198).

Petitioner first challenged the constitutionality of this search and seizure under the Fourth and Fourteenth Amendments by a motion for a return of the articles and suppression of any resulting evidence (App. 5). The Superior Court, after a hearing, found that, at the time the police officers were in the Coolidge home, "Mrs. Coolidge fully intended to cooperate with the police in every way and to furnish them freely with both information and guns in order, as she stated, to clear her husband of any suspicion" (App. 186-187, 201). The Trial Court also found, however, that "Mrs. Coolidge, Jr. is an extremely thin, nervous woman at present time, (August 31 and September 1, 1964) and that, assuming her condition is not greatly dissimilar today than it was then (February 2, 1964), she would have been more nervous than a normal person of her age would have been" (App. 187, 196). And the court specifically found that "Mrs. Coolidge had no knowledge of any constitutional rights, either by explanation of the police or otherwise, to deny the police the right to examine these [articles]" (App. 186-187, 201).

The finding must be read in the light of her testimony (App. 94):

> Q. And did they tell you that you didn't have to give them these weapons unless you wanted to?
>
> A. No; I felt that I had to.

The Superior Court then transferred the case to the State Supreme Court without a ruling (App. 205). The Supreme Court, explicitly noting that questions were raised under the Fourth and Fourteenth Amendments, denied the motion upon the grounds that there was no search and seizure in the house and that, so far as the automobiles were concerned, the wife's consent made it reasonable to search for and seize the personal possessions of the husband (App. 210-220).

At the trial the Mossberg rifle, the clothes and vacuum sweepings from the clothes seized in the house[2] were received in evidence over petitioner's objection explicitly invoking the Fourth and Fourteenth Amendments (App. 227, 228, 230). The State's theory was that the Mossberg rifle was the gun which shot the Mason girl, thus linking petitioner and the crime (App. 266). Petitioner's jacket and pants, and vacuum sweepings taken from them, were submitted to the jury on the theory that they established an additional link between the petitioner and the crime (App. 267). The exceptions were preserved and argued on appeal, but the State Supreme Court adhered to its prior ruling (App. 267-268).

A second search and seizure occurred on February 21, 1964, while petitioner was in custody, this time without either his or his wife's consent (App. 84, 225). On February 19 - two days earlier - the Manchester Police Chief, and two investigating officers, the Colonel of the State Police and two State Police captains, and two Assistant Attorneys General had conferred with New Hampshire Attorney General William Maynard in his office to review and plan the future course of the investigation (App. 236-240). This meeting was the latest in a series of meetings on the case between Attorney General Maynard and the Chief of the Manchester Police. The direction of the investigation had come chiefly from the office of the Attorney General.

[2]No items taken from the automobiles on the night of February 2 were offered in evidence.

The meeting focussed upon the evidence that had been gathered concerning petitioner (App. 236-237). At its conclusion, Chief McGranaghan requested an arrest warrant charging the petitioner with the murder of Pamela Mason (App. 239), and four search warrants authorizing the search of the Coolidge home, a laundromat, the Coolidge 1951 Pontiac and the Coolidge 1963 Chevrolet (App. 239-240). The formal applications for the warrants were made under oath but they contained only conclusory averments of probable cause (Defts. Exh. A-D, App. 133-164). None of the factual information presented to the Attorney General was under oath (App. 248-251). No record was made with regard to any of the information presented. No affidavit or other sworn testimony was presented. (App. 80.)

Attorney General Maynard took Chief McGranaghan's oath as a Justice of the Peace (App. 188, 251). Attorney General Maynard then issued the only search warrants, even though he was in charge of the investigation and would later be the Chief Prosecutor at the trial.

That night, several hours after petitioner had been arrested, the police impounded his two automobiles and towed them to the Manchester Police Garage (App. 77-73, 256-257). The 1963 Chevrolet automobile was searched on February 21, 1964 (App. 257). Deputy Police Chief Leavitt and Roger Beaudoin, a State Police Laboratory Technician, searched and vacuumed the 1951 Pontiac automobile for the first time on the afternoon of February 21, 1964 (App. 255). The materials removed were sent to the University of Rhode Island laboratories on February 24, 1964 (App. 255). The Pontiac was searched and microscopic sweepings were removed a second time on January 4, 1965, and again on April 10, 1965 (App. 258).

Before trial petitioner moved for return of the property and suppression of any evidence upon the ground that the warrant was invalid under the Fourth and Fourteenth Amendments because it was not issued by an impartial magistrate and because there was no showing of probable

cause (App. 5-6, 192-193: Defendant's Memorandum of Law in Support of Motion to Quash pp. 2, 3-5, 5-7). The Superior Court transferred the cause to the Supreme Court of New Hampshire (App. 205-206), which denied the motion to suppress, specifically ruling that there was no violation of rights under the Fourth and Fourteenth Amendments (App. 210, 220-225).

The articles seized under the warrant had critical importance at the trial because the State, having no direct evidence of guilt, sought to prove physical association between the decedent and petitioner's automobile by showing substantial similarity between the particles of matter taken from the decedent's clothes and, by the vacuuming, from petitioner's automobile (App. 265). Petitioner objected to admission of this evidence upon numerous grounds, including the constitutional grounds raised by the motion to suppress (App. 227, 228-229, 230, 254-255, 259). Exceptions were saved and the constitutional issues argued on appeal, but the State Supreme Court adhered to its prior ruling (App. 269-270).

On the appeal after verdict the Supreme Court of New Hampshire, although it found enough evidence to let the jury's verdict stand, also observed (App. 265, 266, 267) -

> The proof, however, was not wholly free from weaknesses. * * *
>
> The limitations of time served to cast doubt upon the likelihood that the State was correct in its theory that the crimes had been committed in a space of three and one-half hours of extremely stormy weather. Further doubts were cast by evidence * * *
>
> In the field of ballistics the credibility of the State's evidence was strained by events which transpired at the trial. * * *
>
> The evidence concerning matching particles was arguably inclusive on the issue of probability. * * *

SUMMARY OF ARGUMENT

I.

The admission into evidence of articles taken from petitioner's automobile on and after February 21, 1970 violated his constitutional rights under the Fourth and Fourteenth Amendments because the search and seizure took place under search warrants that did not meet constitutional requirements. The warrants were invalid for two independently sufficient reasons.

First, the search warrants were not issued by a "neutral and detached magistrate", as required by the Constitution, but "by the officer engaged in the often-competitive enterprise of ferreting out crime". *Mancusi v. DeForte*, 392 U.S. 364, 371. The search warrants were issued by William Maynard, the Attorney General of New Hampshire. Mr. Maynard was in active charge of the investigation into a highly-publicized crime. He would later lead the prosecution. Holding a separate commission as Justice of the Peace was insufficient, under these circumstances, to make him either neutral or detached. *Cf. Tumey v. Ohio*, 273 U.S. 510; *In Re Murchison*, 349 U.S. 133.

Second, the only affidavit, which came from the Chief of Police, stated no facts from which an independent magistrate could make his own determination upon the question of probable cause. The additional information orally furnished by investigators working under Attorney General Maynard's direction was not supplied "by oath or affirmation" as required by the Fourth and Fourteenth Amendments. On this aspect of the case, therefore, reversal would be required by *Aguilar v. Texas*, 378 U.S. 108, even if the search warrants issued by the Chief Prosecutor could otherwise be sustained.

II.

The admission into evidence of the Mossberg rifle and clothing seized in petitioner's bedroom on February 2, 1964 also violated his rights under the Fourth and Fourteenth Amendments. Upon that occasion the police had no warrant. Petitioner was in custody, and there was no exigency dispensing with the normal requirement of a warrant.

Neither Mrs. Coolidge's willingness to admit the police officers to the Coolidge home nor her acquiescence in their following her into the bedroom and seizing the guns and clothing validated the officers' action. The policy of the Fourth Amendment is to afford the individual both personal privacy against official intrusion and personal security against unauthorized prying designed to secure information with which to fortify the coercive power of the State. The guns and clothes were petitioner's personal belongings. The police officers did not come upon them during the period in which they were sitting in the living room or kitchen obtaining the testimony of Mrs. Coolidge. *Cf. Frazier v. Cupp*, 394 U.S. 731. Whatever the officers' license to come into the house to question her about her knowledge, when they followed Mrs. Coolidge into the bedroom, it was petitioner's guns that they were after; it was only he against whom they were seeking evidence. Mrs. Coolidge was involved at this juncture only as the officers might use her to obtain petitioner's private belongings - or acquiesce in their taking them - without obtaining either his permission or a proper warrant.

Since the rights of privacy and security against unauthorized official intrusion are personal, a third person cannot waive them unless authorized by the principal to act as his agent. *Stoner v. California*, 376 U.S. 483, 489. Petitioner gave his wife no authority to make decisions affecting his constitutional rights. Since he was readily available, there was no emergency requiring someone to act for him in his absence. Nor does a wife have such authority merely by virtue of her marital status; the law gives her no power to

dispose of her husband's property, much less his constitutional rights.

To say that the wife's assent to seizure of her husband's personal belongings while he is in custody is alone enough to make "reasonable" an otherwise unconstitutional search and seizure is to put constitutional guarantees at the whim of whatever fear, anger, selfishness, vagary or misunderstanding the pressure of an official intrusion may put upon his wife. The sole effect of adopting such a rule, in situations where the husband himself could be asked, is to substitute the chance of the wife's decision for a magistrate's ruling upon probable cause.

ARGUMENT

I.

THE WARRANT FOR THE SEARCH AND SEIZURE OF PETITIONER'S AUTOMOBILES DID NOT SATISFY THE FOURTH AND FOURTEENTH AMENDMENTS.

The search and seizure of petitioner's two automobiles on February 21, 1964 under search warrants issued by the Attorney General of New Hampshire as a Justice of the Peace violated the Fourth and Fourteenth Amendments for two reasons: *first*, the Attorney General, while actively engaged in a criminal investigation looking towards a prosecution which he will personally conduct, is not the "neutral and detached magistrate" required by the Fourth and Fourteenth Amendments; *second*, the warrant was issued upon unsworn reports and a conclusory affidavit instead of upon oath or affirmation sufficient for a magistrate to make his own finding of probable cause. Either defect alone is enough to vitiate the warrant and render the search and seizure unlawful. Consequently, the admission of articles seized under the warrant as evidence of guilt denied petitioner a constitutional trial. *Mapp v. Ohio*, 367 U.S. 643.

1. A search warrant is valid under the Fourth Amendment only if issued by a "neutral and detached magistrate". *Mancusi v. DeForte*, 392 U.S. 364, 371. The principle has been repeatedly affirmed in the opinions of this Court. *Johnson v. United States*, 333 U.S. 10, 14; *Giordenello v. United States*, 357 U.S. 480, 486; *Aguilar v. Texas*, 378 U.S. 108, 114-115.

In *Mancusi v. DeForte, supra*, State officers searched the office of a labor union official and seized certain union records after the union had refused to comply with a subpoena duces tecum issued by the District Attorney. Later the records were admitted in evidence against the individual official while he was on trial upon an indictment for conspiracy and extortion. After holding that the individual official had standing to challenge the search of the office, this Court ruled that, even if the subpoena duces tecum were treated as a warrant, it "could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that 'the inferences from the facts which lead to the complaint ". . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14.' *Giordenello v. United States*, 357 U.S. 480, 486." 392 U.S. at 371.

Mancusi v. DeForte, supra, governs the instant case. The only difference is that where the prosecutor in that case held only one commission, William Maynard, the prosecutor who signed the warrant in this case, held commissions as both Attorney General and Justice of the Peace.

This purely formal circumstance is constitutionally irrelevant. Holding a commission as Justice of the Peace was not enough to make Mr. Maynard "neutral" or "detached". He was nonetheless the chief prosecutor both in law and in fact. He was still "the officer engaged in the often competitive enterprise of ferreting out crime." *Cf. Tumey v. Ohio*, 273 U.S. 510; *In Re Murchison*, 349 U.S. 133.

The record puts these characterizations beyond dispute. Attorney General Maynard was in active charge of investigating the crime of which the petitioner was accused (App. 251). For days the crime and ensuing investigation were headline news. Attorney General Maynard was constantly questioned by the press. The banner headline in the *Manchester Union Leader* for February 16 - four days before he signed the warrant - read "MAYNARD HAS SUSPECT". He had issued statements promising ruthless investigation. Later, he would lead the prosecution (App. 228). The warrants were issued after a meeting held by him in his own office as the senior official responsible for the progress of the investigation. It is irrelevant that he held a commission as a Justice of the Peace and signed the warrants in that capacity.[3] Plainly, a prosecutor cannot, merely by taking off one hat and putting on another, become a neutral and detached judicial officer unaffected by the external and internal pressures arising out of his involvement in the investigation and prosecution of the same crime. The trial judge put the point succinctly (App. 254) -

> I found that an impartial magistrate would have done the same thing as you did. I don't think, in all sincerity, that I would expect that you could wear two pairs of shoes.

The court below ignored the principles stated in *Mancusi* and *Johnson*, apparently reasoning that under *Ker v. California*, 374 U.S. 23, the federal requirement of an impartial magistrate does not apply to the States. The holding is squarely opposed to this Court's decision in *Mancusi*, which was a Fourteenth Amendment case. The reasoning also misapplies the *Ker* opinion. The prevailing opinion in *Ker* distinguished "between evidence held inadmissible because of our supervisory powers over federal courts and that held in-

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[3]Under New Hampshire law the functions of a justice of the peace were limited to issuing warrants, performing marriage ceremonies, and taking acknowledgments. New Hampshire RSA 595:1, 592-A:5, 456:4, 457:31.

admissible because prohibited by the United States Constitution" (*id.* at 33) but the opinion of the Court and all the separate opinions[4] declare that the admissibility of evidence obtained by search and seizure in State proceedings is to be determined by what the Court described as "the 'fundamental criteria' laid down by the Fourth Amendment and in the opinions of this Court applying that Amendment" (*ibid*).

The requirement that the existence of probable cause be determined by a neutral and detached magistrate is one of those "fundamental criteria". Its absence invalidated the search and seizure, and required exclusion of the evidence seized.

2. The search warrant had a second fatal fact: the affidavit of the Manchester Chief of Police was wholly conclusory and therefore insufficient for a finding of probable cause. Under the Fourth Amendment the sworn evidence must give the "neutral and detached magistrate" sufficient basis to "judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. *Giordenello v. United States,* 357 U.S. 480, 486. See also *Nathanson v. United States,* 290 U.S. 41. Under the Fourteenth Amendment the same rule is applicable to the States. *Aguilar v. Texas,* 378 U.S. 108.

In the present case, the complaint for a search warrant verified by the Manchester Chief of Police stated (Defts. Exh. A-D, App. 133-164) -

> "that he has probable cause to suspect and believe, and does suspect and believe, and herewith offers satisfactory evidence, that there are certain objects

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[4]Justice Harlan, concurring, recognized that, under *Ker,* "state searches and seizures are to be judged by the same constitutional standards as apply in the federal courts" (*id.* at 45). Justice Brennan, speaking for the dissenting justices, expressed their concurrence in the majority's holding that the state searches and seizures are to be judged by the same "constitutional standard" applied to federal officials. (id. at 46). See also *Aguilar v. Texas,* 378 U.S. 108, especially the concurring opinion of Justice Harlan at p. 116.

> and things used in the commission of said offense now kept concealed in or upon a certain vehicle, to wit: 1951 Pontiac 2 Door Sedan. * * *"

In *Aguilar v. Texas, supra,* the affidavit stated -

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.

The *Aguilar* affidavit was held too conclusory to satisfy the Fourth and Fourteenth Amendments. A fortiori the Amendments are not satisfied by the vaguer generality of the affidavit of the Manchester Chief of Police.

The court below concluded that the requirements of *Aguilar* were satisfied because "the magistrate was fully informed as to 'the facts relied upon by the complaining officer to show probable cause.'"

Not one iota of such information was furnished under oath, either by sworn testimony or by affidavit.[5] The Fourth Amendment explicitly states that the showing of probable cause be "supported by Oath or affirmation." Unsworn oral reports cannot be used to circumvent the rule that a constitutionally-valid warrant cannot be issued by a magistrate "unless he can find probable cause therefor from facts or circumstances *presented to him under oath or affirmation.*" *Nathanson v. United States,* 290 U.S. 41, 47, approved in *Aguilar v. Texas,* 378 U.S. 108, 112 (emphasis supplied).

The reliance upon unsworn reports simply underscores the inadequacy of the entire search warrant procedure in the present case. The meeting leading to the issuance of the warrants was called by the Attorney General as law en-

[5]The literal accuracy of the above statement is beyond dispute. It rests upon the concession of Attorney General Maynard while serving as chief prosecutor at the hearing on the motion to suppress. (App. 80.)

forcement officer in order to review the progress of the investigation with his subordinates and plan future steps. Naturally, the reports made by the police and other law enforcement officials were not under oath. Thereafter the Chief of Police and Attorney-General went through the "formalities" of signing a complaint, taking the oath, and issuing a warrant. To hold that such a conference of those charged with ferreting out crime and preparing for a trial can provide an adequate basis for a search and seizure would make a mockery - we submit - of the Fourth Amendment's guarantee of a detached judicial determination of probable cause upon evidence under oath or affirmation.

3. The trial court's finding that an impartial magistrate would have issued the warrant does not cure the constitutional defect. "It is, of course, immaterial that the State might have been able to obtain the same [evidence] by means which did not violate the Fourth Amendment." *Mancusi v. DeForte,* 392 U.S. 364, 372, n. 12, quoting *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 392. A search and seizure without a warrant cannot be validated by showing that there were grounds for the search upon which a warrant might have been issued. *Chapman v. United States,* 365 U.S. 610; *Johnson v. United States,* 333 U.S. 10. Nor can a warrant based upon insufficient evidence of probable cause be validated by proof that a stronger showing was available. *Giordenello v. United States,* 357 U.S. 480; *Aguilar v. Texas,* 378 U.S. 108. The reason for the rule, in all cases, is that an informed judicial determination of probable cause cannot be supplied *nunc pro tunc* after the wrong has been done. That reason applies equally to the present case.

4. Respondent's Brief in Opposition argued that the search was constitutional because incident to a lawful arrest. Regardless of whether the arrest was lawful or unlawful, the argument has two fatal defects.

First, the undisputed facts show that the search of the automobile and seizure of the evidence were not incident to the arrest. Petitioner was arrested at 7:40 p.m. and booked at 8:00 p.m. on February 19, 1964. There is no suggestion that he was in either automobile or about to use either automobile at that time. The automobiles were not impounded until at least an hour or hour and a half after petitioner had been imprisoned (App. 77-78). The automobiles were not searched until February 21 at the police station - two days after the arrest (App. 203, 257). The return upon the search warrant recites that the search was made under the warrant; it does not refer to an arrest (App. 144-148). Plainly, the search was not "substantially contemporaneous with the arrest and . . . confined to the immediate vicinity of the arrest." *Shipley v. California,* 395 U.S. 818, 819; *Stoner v. California,* 376 U.S. 483, 486.

Second, the search cannot constitutionally be sustained as an incident of the arrest because "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston v. United States,* 376 U.S. 364, 367. Here, as in *Preston,* the booking and time interval demonstrate the complete absence of any of those circumstances which justify a search truly incident to a lawful arrest. See also *Chimel v. California,* 395 U.S. 752; *Chambers v. Maroney,* No. 830, October Term 1969, 38 U.S. Law Week 4547, 4548.

II.

THE UNLAWFUL SEARCH AND SEIZURE OF PETITIONER'S PERSONAL POSSESSIONS, WHILE HE WAS IN CUSTODY, WAS NOT VALIDATED BY THE ACQUIESCENCE OF HIS WIFE.

Late in the evening of February 2, 1964, about four hours after taking petitioner into custody, Detective Sergeant McBain of the New Hampshire State Police and Inspector Glennon of the Manchester Police were sent from the Manchester Police Station to petitioner's home in order to "check out" his activities by questioning his wife (App. 33). When Mrs. Coolidge acknowledged in answer to their questions that there were guns in the house, the officers asked to see the guns (App. 94). They followed to the bedroom closet where she took out the guns (App. 94). When they told her, in answer to her question, that they wanted to take the guns, she gave her assent (App. 102, 201). The two police officers also asked for and examined some of the petitioner's clothing (App. 101). They took away some trousers and a jacket as well as the four guns (App. 173-174). All the items were petitioner's personal possessions - not the shared property of husband and wife.

As Officers Glennon and McBain left, they told Mrs. Coolidge that they wished to inspect the two cars parked in the driveway. She gave them the keys. The officers took from the vehicles a pair of trousers, a wool cap, a glove, a coat hanger, a paring knife and a box of bullets. The officers claimed to have left a receipt with Mrs. Coolidge. (App. 201.)

At the trial one of the guns taken from the closet and also articles of clothing seized in the house were introduced in evidence against petitioner over his objection (App. 227, 228, 230, 267-268). Such use was reversible error if the conduct of the police officers violated the Fourth and Fourteenth Amendments. *Mapp v. Ohio*, 367 U.S. 643. Since the police officers had no warrant and petitioner himself

gave no assent, inspecting and carrying away his personal effects were palpable violations of his constitutional rights unless the conduct of his wife validated the action of the police. We submit that her conduct did not validate their otherwise admittedly unlawful intrusion.

1. Contrary to the opinion below, the role of Mrs. Coolidge did not take the activities of the police officers out of the category of "searches and seizures" covered by the Fourth Amendment. We assume arguendo that their presence in the living room or kitchen was not unlawful, but an unlawful search and seizure surely began when the officers demanded any guns belonging to petitioner. Mrs. Coolidge showed the officers where the guns were kept so that they did not have to hunt about for themselves, but it is plain that Mrs. Coolidge did not take the initiative - she went to the guns only after interrogation and at the officers' request. They followed her into the bedroom and to the bedroom closet without asking her permission. Similarly, the police asked for the petitioner's clothing and said that they wished to take it away with them. Throughout these events the police officers were seeking petitioner's personal belongings as evidence against him. Mrs. Coolidge was of concern to them at that stage only as she might acquiesce in the taking and serve as their instrument in making the search. Whatever the proper characterization of the earlier events, therefore, once the officers told Mrs. Coolidge to show them the guns, the search became theirs.

The critical distinction is sharpened by supposing that Mrs. Coolidge had given the officers "permission" to look for the guns. In that event there would have been the same kind of search and seizure as occurred later at the automobiles. Instead of allowing them to pry about until they found the guns, she avoided that unpleasantness by going to the closet for the officers, upon their direction, to show them the guns. Legally and practically, the two situations are identical. Difficulty in finding the wanted article is not the hallmark of a "search and seizure". The constitutional

command is violated whether the officers hunt for hours or, at their request, are led quickly by an unauthorized person to what they are seeking. In each case, there is the same unwarranted intrusion upon the privacy of the victim.[6]

In the house, therefore, as later in inspecting and taking articles from the automobiles, Officers McBain and Glennon violated petitioner's Fourth and Fourteenth Amendment rights unless his rights were effectively waived by the alleged consent of Mrs. Coolidge.

2. This Court has never decided whether proof of a wife's acquiescence in the search and seizure of her husband's personal effects in a criminal investigation in which he but not she is involved is enough to satisfy the Fourth Amendment. *Amos v. United States*, 255 U.S. 313, went off upon the ground that the wife's consent was coerced - a position that might well be taken in the present case (pp. 38-39 below). In *Henry v. Mississippi*, 379 U.S. 443, the

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[6]The instant case should also be contrasted with the situation that would arise if a wife took her husband's belongings to the police station upon her own initiative. See Recent Case, *State v. Coolidge*, 79 *Harv. L. Rev.* 1513, 1519 (1966). Since the police would have done no wrong, the evidence would be admissible just as if the articles came into the hands of the police from a total stranger to the family without any form of police encouragement or participation. Burdeau v. McDowell, 256 U.S. 465; United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964), cert. denied, 377 U.S. 953; see United States v. McGuire, 381 F.2d 306, 312-314, n. 5, collecting recent authorities. People v. Helmus, 50 Misc.2d 47, 269 N.Y.S.2d 613 (1966) was such a case.

If the police ask the stranger to get the evidence for them, he becomes their agent and use of the evidence violates the Fourth and Fourteenth Amendments. Flagg v. United States, 233 Fed. 481 (2nd Cir. 1916), approved in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392; *cf.* Byars v. United States, 273 U.S. 28, 32; Stapleton v. Superior Court, 73 Cal. Reptr. 575, 447 P.2d 967 (1969). See, also, Note, *Seizures by Private Parties*, 19 *Stan. L. Rev.* 608 (1967).

The rule should be the same if the police ask the wife to get the evidence, unless her assent binds her husband.

Court noted the importance of issue but decided the case upon other grounds. The numerous precedents in State and lower federal courts reach widely variant conclusions.[7] Although most of the opinions upholding such searches and seizures are broad enough to cover the present case, many of the cases could better have been decided upon narrower grounds not applicable to the present controversy.[8] Very few cases sustain the admission of the defendant's own personal effects as evidence where the police officers sought and seized them with only his wife's assent at a time when he was in custody and his own decision upon whether to surrender his privacy could readily have been obtained.[9]

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[7]The best analyses of the issues are Mascolo, *Interspousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach*, 40 *Conn. Bar. J.* 351 (1966); Recent Case, *State v. Coolidge*, 79 *Harv. L. Rev.* 1513 (1966). Note, *Third Party Consent*, [1967] *Wash. U.L.Q.* 12, 25-27 contains a useful collection of cases. See also Comment, *The Effect of a Wife's Consent to a Search and Seizure of the Husband's Property*, 69 *Dick. L. Rev.* 69 (1964).

We have endeavoured to classify in the text and footnotes following those cases which deal directly with the effect of a wife's or mistress's voluntary assent to what would otherwise be an unconstitutional search and seizure. The collection is intended to be complete but we should note that, since close judgments were sometimes necessary concerning the actual ground of decision, some cases have been omitted that another reader might include. For example, we exclude cases in which the wife holds title jointly with the husband and the decision is based upon grounds applicable to any co-owner. *E.g.* State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948).

No effort has been made to collect cases upon the effect of assent by a parent, landlord, child, or other third party.

[8]The decisions which should have been put upon narrower grounds are categorized below in the text and notes at n. 9, 15, and 17 below.

[9]People v. Carter, 48 C.2d 737, 312 P.2d 665 (1957); People v. Garner, 234 C.A.2d 212, 44 Cal. Reptr. 217 (1965); People v. Palmer, 31 Ill.2d 58, 198 N.E.2d 839 (1964); State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (1969); *cf.* Commonwealth v. Cabey, 30 Pa. D. & C. 2d 753 (1963), affirmed by equally divided court, 201 Pa. Super. 433, 193 A.2d 663 (1963), cert. denied, 380 U.S. 926.

Our submission, on the other hand, is supported by the precedents holding that the wife's consent to a search and seizure of the family premises does not affect the husband's rights[10] and also by the cases taking the narrower ground

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In the following cases the husband was in police custody and could therefore have been asked for permission but the police were searching for contraband or stolen property, not for his personal effects: People v. Dominguez, 144 C.A.2d 63, 300 P.2d 194 (1956); People v. Perroni, 14 Ill.2d 581, 153 N.E.2d 578 (1958), cert. denied, 359 U.S. 980, 1004; People v. Harvey, 48 Ill. App.2d 261, 199 N.E.2d 236 (1964); Gutridge v. State, 236 Md. 514, 204 A.2d 557 (1964). Compare Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), cert. denied, 380 U.S. 980 (expended bullet desired for comparison); State v. Comeaux, 252 La. 481, 211 So.2d 620 (1968) (pinking shears and rags used in preparation for burglary).

In the following cases the search was for the husband's personal effects but he was neither present nor in custody: In Re Lessard, 62 C.2d 497, 399 P.2d 39 (1965); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964); Chandler v. State, 7 Md. App. 646, 256 A.2d 695 (1969); Ennox v. State, 130 Tex. Cr. 220, 94 S.W.2d 473 (1936); Burge v. State, ___Tex. Cr.____, 443 S.W.2d 720 (1969). See Lester v. State, 216 Tenn. 615, 619-622, 393 S.W.2d 288, 290-291 (1965), cert. denied, 383 U.S. 952.

In the following cases the search was for contraband or stolen property and the husband was neither present nor in custody: Stein v. United States, 166 F.2d 851 (9th Cir. 1948), cert. denied, 334 U.S. 844; United States v. Retolaza, 398 F.2d 235 (4th Cir. 1968), cert. denied, 393 U.S. 1032; United States v. Thompson, 421 F.2d 373 (5th Cir. 1970); People v. Megliorino, 192 C.A.2d 525, 13 Cal. Reptr. 635 (1961); People v. Speice, 23 Ill.2d 40, 177 N.E.2d 233 (1961), cert. denied, 369 U.S. 848; Smith v. McDuffee, 72 Ore. 276, 142 Pac. 558 (1914); Pruitt v. State, 109 Tex. Cr. 71, 2 S.W.2d 856 (1928); Alejandro v. State, 116 Tex. Cr. 325, 31 S.W.2d 456 (1930); Ellis v. State, 130 Tex. Cr. 220, 93 S.W.2d 438 (1936); Wheeless v. State, 142 Tex. Cr. 68, 150 S.W.2d 806 (1941); Brown v. State, 155 Tex. Cr. 347, 235 S.W.2d 142 (1950); Joslin v. State, 165 Tex. Cr. 161, 305 S.W.2d 351 (1957).

[10]United States v. Rykowski, 267 Fed. 866 (E.D. Ohio 1920); Cofer v. United States, 37 F.2d 677, 679 (5th Cir. 1930); United States v. Derman, 66 F.Supp. 511 (S.D. N.Y. 1946); United States v. Greer, 297 F.Supp. 1265, 1269 (N.D. Miss. 1969); State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); Carlton v. State, 111 Fla. 777, 149

that, regardless of what may be the rule about other portions of the premises, the wife cannot validate official prying into her husband's personal effects.[11]

On its face, the assertion that a wife can waive her husband's constitutional right to be free from official prying is a startling proposition. The lesson would be that the police, in *Stoner v. California*, 376 U.S. 483, should have telephoned Mrs. Stoner (assuming her existence) and obtained her consent to search Stoner's hotel room. In *Katz v. United States*, 389 U.S. 347, the FBI agents, if the proposition is sound, could have avoided a constitutional violation without the necessity of obtaining a court order based upon probable cause merely by inducing Mrs. Katz to consent to the electronic surveillance of her husband's telephone conversations. These instances are the more dramatic because the search and seizure did not take place at the couple's

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So. 767 (1933); Rivers v. State, 59 So.2d 740 (Fla. 1952); State. v. Blakely, 230 So.2d 698 (Fla. 1970); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923); Veal v. Commonwealth, 199 Ky. 634, 251 S.W. 648 (1923); Henry v. State, 253 Miss. 263, 278-279, 154 So.2d 289, 295, vacated, 379 U.S. 443, on remand, ___ Miss. ___, 202 So.2d 40 (1967), cert. denied, 392 U.S. 931; State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965); Carignano v. State, 31 Okla. Cr. 228, 238 P. 507 (1925): Rose v. State, 36 Okla. Cr. 333, 254 P. 509 (1927); Simmons v. State, 94 Okla Cr. 18, 229 P.2d 615 (1951); Humes v. Taber, 1 R.I. 464, 472-473 (1850); Kelley v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946); see Fitter v. United States, 258 Fed. 567, 573-574 (2d Cir. 1919); *cf.* Foster v. United States, 281 F.2d 310 (8th Cir. 1960). The status of *Dalton v. State, supra*, seems cloudy after *Greer v. State*, ___ Ind. ___, 255 N.E.2d 919 (1970).

[11] State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962); Manning v. Commonwealth, 328 S.W.2d 421 (Ky. 1959); People v. Gonzalez, 50 Misc.2d 508, 270 N.Y. S.2d 727 (1966). See also Cass v. State, 124 Tex. Cr. 208, 216, 61 S.W.2d 500, 504 (1933) intimating that the usual Texas rule holding the wife's consent effective to validate a search and seizure of the husband's property might not apply to "some private writing or personal effect."

home, but it seems equally startling to suppose that a wife can effectively waive her husband's right not to have officialdom listen to his private telephone conversations upon his home telephone or that the Fourth Amendment is satisfied if she tells the police, "You can go all through my husband's papers in search of evidence linking him to subversion. Look carefully through the oak desk; it's in his study in the back of the house. But be sure to come in the afternoon when I am out. I can't risk being seen with you."

The core policy of the Fourth Amendment is the preservation of the privacy of the individual against official intrusion into his person, home, papers and effects. The Amendment may do more, for it may guarantee some security against interference with property interests, but the basic aim is to secure for the individual's person and personal belongings a private area in which he may be free, if he wishes, from the intrusions of government agents unless their intrusion is justified by exigent circumstance or a warrant issued by a detached and neutral judicial officer upon a showing of probable cause.[12]

Thus, in *Davis v. United States*, 328 U.S. 582, 587 the Court observed -

> The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of these two constitutional provisions [referring to the Fourth and Fifth Amendments]. *Boyd v. United States*, 116 U.S. 616. It reflects a dual purpose - protection of the privacy of the individ-

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[12] In speaking of the "privacy" secured by the Fourth Amendment we refer only to the right to be free from unauthorized government intrusions of a character usually associated with law enforcement. "Privacy", in this sense, is not identical with secrecy. An individual's right of privacy against the press and other non-governmental invasions is usually a matter of State law except as the latter must yield to First Amendment privileges. Furthermore, such expressions as "zone of privacy" or "area of privacy" are not intended to have strict geographical or spatial connotations. See Katz v. United States, 389 U.S. 347.

> ual, his right to be let alone; protection of the individual against compulsory production of evidence against him.

Similarly, in *Johnson v. United States*, 333 U.S. 10, 14, 15, the Court spoke of the individual's "right of privacy" to describe personal security and freedom from surveillance of government officials. See also *McDonald v. United States*, 335 U.S. 451, 455. And in *Wolf v. Colorado*, 338 U.S. 25, 27, the Court held that "[t]he security of one's privacy against arbitrary intrusions by the police" is "at the core of the Fourth Amendment". Mr. Justice Black, speaking for the Court, quoted this holding in *Frank v. Maryland*, 359 U.S. 360, 362, 365, and observed -

> two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.

The personal quality of both rights - of privacy against official intrusion and of resistance to unauthorized demands for evidence of guilt - has also been emphasized in this Court's decisions. In *Katz v. United States*, 389 U.S. 347, the Court twice declared (pp. 351 and 353) -

> the Fourth Amendment protects people, not places

Since the protection is personal, only the individual upon whose privacy the police wish to intrude can decide whether to shut the door or expose what they wish to see. This principle, too, is the law of this Court. In *Stoner v. California*, 376 U.S. 483, 489, the Court observed -

> It is important to bear in mind that it was petitioner's constitutional right which was at stake here,

> and not the night clerk's nor the hotel's. It was a right, therefore, which only petitioner could waive by word or deed, either directly or through an agent.

Similarly, in the case at bar, it was petitioner Coolidge's constitutional right, not his wife's, which was at stake when the police asked to see his guns and clothing. Only Coolidge could waive the right, therefore, directly or through an agent.

There is no suggestion that petitioner consented to the official intrusion by word or deed. He was readily available, being in custody, but the police, instead of seeking his permission to inspect his personal belongings, went to his home where they might prevail upon his wife.

Nor can it be contended that Mrs. Coolidge was petitioner's agent for the purpose of deciding whether to assert or waive his constitutional rights. The elementary agency principle that the marital relation gives the wife neither actual nor apparent authority nor agency power to bind her husband in commercial transactions (*Restatement (Second) of Agency* § 22 (1957)) applies *a fortiori* to so personal a matter as the waiver of constitutional rights. The State offered no evidence whatsoever to satisfy its burden of showing that petitioner had authorized, or given the police the impression that he had authorized, his wife to act as his agent if anyone should come to the house seeking to gather evidence from his belongings while they held him at the police station.

In an emergency authority *ex necessitatu* can sometimes be implied. *Cf. Restatement (Second) of Agency* § 47, comment *b* (1957). If a suspect were unavailable and the question were whether his interests would be better served by cooperation with the police or insistence upon a search warrant, conceivably the wife might have had implied authority to make the decision. But that is not this case. Petitioner was not "absent" in the only sense relevant here.

He was readily available at the police station. The only reason for not seeking his decision - if one adverted to the question - was the chance that he might withhold his consent.

Nor is this a case in which the police are invited into the premises by the wife as in the normal conduct of her own or family affairs and the officers then seize an article open to ordinary view. Such cases are particular examples of the numerous situations in which two individuals have formed so close an association that the zone of privacy which each may decide whether to open or bar to governmental intrusion necessarily overlaps the privacy of the other. *Frazier v. Cupp*, 394 U.S. 731, is the leading example in this Court. Frazier and Rawls agreed to share a duffel bag. Later, suspicion fell upon both in connection with a serious crime. Rawls, while undergoing questioning, gave the police permission to search the duffel bag for his clothing. The agreement between Frazier and Cupp to share the bag naturally gave each the right to authorize an inspection in the course of any inquiry into what he himself might have in the bag even though it affected the privacy of the other. The Court held that because the inspection for Rawls' clothing was permissible, the police were entitled to use against Frazier any evidence upon which they came incidentally in the course of the lawful search for Rawls' effects. This does not mean that Rawls could waive Frazier's constitutional rights. The intrusion would have been unconstitutional if the police had asked Rawls to let them search the duffel bag solely in an effort to obtain evidence against Frazier,[13] for in that event Rawls would have been deciding what to do about Frazier's privacy rather than his own. In the actual posture of the case Frazier's clothes became admissible in evidence because they were the incidental fruits of a lawful inspection into Rawls' effects. Since the exclusionary rules of the *Silverthorn Lumber* case and *Mapp v. Ohio* are

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[13] See pp. 30-31 below.

only deterrent sanctions to check unlawful searches, there is no reason to exclude evidence incidentally produced by lawful police conduct, even though a search for that evidence alone would have been unlawful. That this was the ground of the decision is demonstrated by both the language of the opinion and the emphasis put upon *Harris v. United States,* 390 U.S. 234.[14]

A situation between husband and wife similar to *Frazier v. Cupp* would be presented if husband and wife were suspected of criminal conduct and the wife voluntarily consented to a search of their home in an effort to clear herself of the accusation, relieve her conscience, or mitigate the consequences of her offense. A wife has authority to admit others to the property in conducting her personal affairs. In such a case any evidence against the husband which incidentally came to the attention of the police might well be admissible at his trial. That was the actual situation in a number of cases upholding the efficacy of the wife's consent although the decisions were sometimes put upon broader grounds.[15] Plainly, that is not this case. Mrs. Coolidge could not have been involved in the crime.

Similarly, we may assume arguendo that the mere entrance of the police officers into the Coolidge home was

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[14] In the *Harris* case the Court held (390 U.S. at 236):

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker v. California,* 374 U.S. 23, 42-43 (1963); *United States v. Lee,* 274 U.S. 559 (1927); *Hester v. United States,* 265 U.S. 57 (1924).

[15] The following cases upholding the admission of evidence seized by police officers who have entered with the wife's consent fall into this category: Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), cert. denied, 395 U.S. 977, 981; People v. Rodriguez, 212 C.A.2d 525, 28 Cal. Reptr. 150 (1963); Padilla v. State, 160 Tex. Cr. 618, 273 S.W.2d 889 (1954); *cf.* United States v. Sergio, 21 F.Supp. 553 (E.D. N.Y. 1937).

not a violation of petitioner's constitutional rights. The police officers wished to question Mrs. Coolidge. Their presence intruded upon her privacy, but it was for her to choose whether to shut the door or surrender her privacy while she answered their questions.[16] If her assent was truly voluntary, there was no wrongful intrusion upon her privacy. In the language of agency, she was authorized to admit the officers because giving them information, if she wished, was part of her personal affairs. Possibly there was no wrong to petitioner upon this assumption, since this part of her zone of privacy overlapped his. Consequently, if the police officers had observed the evidence while they were seeking what testimony she could give them, this case, like *Frazier v. Cupp*, might well have been governed by the rule that "objects falling in the plain view of an officer who has a right to have that view are subject to seizure and may be introduced in evidence" (*Harris v. United States*, 390 U.S. 234, 236).[17]

But again, that is not the actual case. The situation changed once the police sought petitioner's guns and went into the bedroom to obtain them. At that juncture the question of Mrs. Coolidge's own relationship with govern-

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[16]There is an ironic contrast between the rule that seeks to protect the marital relation by disqualifying a wife from testifying against her husband without his consent (Hawkins v. United States, 358 U.S. 74, 77-78) and the freedom accorded police officers to interrogate wives about their husbands' activities during a criminal investigation.

[17]The above rationale supports a number of decisions upholding the seizure of evidence where the police were invited into the premises by the wife. United States v. Ball, 344 F.2d 925 (6th Cir. 1965); People v. Howard, 166 C.A.2d 638, 334 P.2d 105 (1958); People v. Alvarez, 236 C.A.2d 106, 45 Cal. Reptr. 721 (1965); People v. Bryan, 254 C.A.2d 231, 62 Cal. Reptr. 137 (1967), cert. denied, 390 U.S. 1044; People v. Shambley, 4 Ill.2d 38, 122 N.E.2d 172 (1954); Traylor v. State, 111 Tex. Cr. 58, 11 S.W.2d 318 (1928). Compare United States v. Alloway, 397 F.2d 105 (6th Cir. 1968), where the officers searching the premises pursuant to a valid warrant observed two suits important as evidence but not covered by the warrant and took them with the wife's consent.

mental authority - of her right to stand upon her privacy against official intrusion or to invite the officers into her house to tell them what she knew about events bearing upon their investigation - was no longer involved. When the officers expressed interest in seeing the guns, they began intruding into petitioner's privacy and his privacy alone. The guns belonged to petitioner. There is no suggestion that Mrs. Coolidge ever used them. Guns are peculiarly a man's personal effects.[18] The police were not concerned about any connection between Mrs. Coolidge and the guns. They were no longer eliciting her testimony. It was *his* guns they were after; it was *he* against whom they were seeking evidence. Mrs. Coolidge was involved at this juncture only as she might give the police petitioner's private belongings - or acquiesce in their taking them - without a warrant. Their request for the guns and jacket was neither more nor less than a demand that Mrs. Coolidge be their instrument in violating petitioner's privacy, thus defeating his rights "to shut the door on officials of the State" and "to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the State" (*Frank v. Maryland*, 359 U.S. 360, 365). Since those rights were personal to petitioner and there was no question of Mrs. Coolidge's own relation to the police, only petitioner could effectively waive the constitutional protection.[19]

3. A significant number of lower court decisions hold that a wife may effectively consent to a search and seizure of property in the couple's home because it is subject to her "possession and control". We urge that this rationale should be rejected for two independently-sufficient reasons.

First, the "rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of

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[18]Mrs. Coolidge testified that she had no interest in firearms and could not tell a rifle from a shotgun unless she could see a bullet (App. 100).

[19]See authorities cited n. 7, 10 and 11 above.

agency or by unrealistic doctrines of 'apparent authority'." *Stoner v. California,* 376 U.S. 483, 489. The "subtle distinctions . . . of private property law" are likewise irrelevant. *Jones v. United States,* 362 U.S. 257, 266. Recently, the Court declared in *Warden v. Hayden,* 387 U.S. 294, 304 -

> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

Second, the rule that "possession and control" gives the wife power to consent to the search and seizure of her husband's property does not parse even as a matter of property law.

(a) Under the customary marital relation the wife has something like custody or physical possession of household goods and also the implied authority to manage both real and personal property in a way appropriate to the day-to-day conduct of household affairs as sanctioned by custom or social usage. She may have greater power if her husband is absent during an emergency. In addition, she doubtless may use the premises and household goods for a wide variety of personal activities and interests.

But the wife's "possession and control" has never been held, in the law of either agency or property, to be an unlimited power of disposition. A wife may look in the drawers or among the papers on her husband's desk to find paper, pencil, or a check book, but none would suggest that the normal marriage relation is enought to imply permission for her to bring in a newspaper reporter to read her husband's letters, study his bankbook, and take copies of his private papers. In *Barker v. Carolina Auto Sales,* 236 S.C. 594, 115 S.E.2d 291 (1960), the court held that a wife can-

not sell her husband's car while he is in the Army, saying that "the mere fact that the husband is absent does not give rise to a presumption that the wife is his agent generally; her authority springs from and is limited to what can be reasonably presumed to be the intention of the husband; it does not extend beyond the authority which is usually and customarily conferred by husbands under the same or similar circumstances." Accord: *Steinburg v. Levy*, 236 S.W.2d 909 (Mo. App. 1922) (sale of household furniture); *State v. Luckey*, 150 Ore. 566, 46 P.2d 1042 (1935) (pledge of husband's tools to secure payment of rent).

Since the wife's "possession and control" does not give her unlimited dominion even as a matter of property law, it does not necessarily include authority, even as a matter of property law, to turn her husband's effects over to the police. Since her authority, in the absence of express authorization or an emergency, is limited to the dispositions sanctioned by custom and social usage as incident to running household affairs, it does not include authorizing an otherwise unlawful search and seizure directed at her husband. Giving the husband's personal belongings to the police is not commonly understood to be part of the normal management of a household. The exchange of marriage vows does not normally convey the message, "Dear wife, always remember that you are authorized to turn any of my belongings over to the police, even though they have not asked my permission."

(b) A number of federal courts of appeals have followed the Eighth Circuit in reasoning that -

> the right of the wife . . . to enter the home which was in her possession and control cannot be seriously questioned and that her invitation to and authorization to the officers to enter and search was an outgrowth thereof. It is not a question of agency, for a wife should not be held to have authority to waive her husband's constitutional rights. This is a question of the wife's own rights to authorize entry into the premises where she lives and of which she has control.

Roberts v. United States, 332 F.2d 892, 896 (8th Cir. 1964), cert. denied, 380 U.S. 980. See also *United States v. Thompson*, 421 F.2d 373 (5th Cir. 1970).

The argument fails to explain how or why the right of the wife to be in the home carries as its "outgrowth" the right to authorize the police to enter and search for her husband's possessions. The wife's own right or privilege to be on the premises is not assignable. The wife's "rights to authorize entry into the premises where she lives and of which she has control" are not indivisible so that she must have either unlimited power to authorize entry or none. On the contrary, common sense tells that the purpose is often decisive. A wife has the undoubted right to authorize entry by her friends or by people such as tradesmen and salesmen with whom she conducts authorized family business but - to revert to earlier examples - surely she has no such right to open the premises to a secondhand dealer to whom she has wrongfully sold the family furniture or to a reporter seeking to examine her husband's personal correspondence. *Cf. Mohn v. Summer*, 48 Cal. App. 314, 191 P.2d 991 (1920). Thus, even as a matter of property law the extent of her right depends upon the use that is invited. *Collins v. Croteau*, 322 Mass. 291, 77 N.E.2d 305 (1948).

In dealing with the police it may well be the wife's privilege to authorize entry while the police are seeking to examine the household property in search of evidence against her, or to elicit her testimony pertinent to some criminal investigation regardless of whether her husband is a suspect. Confined to such cases the Eighth Circuit's statement that the question is one of the wife's own right to authorize entry may well be accurate. Extended to a case like the present, the proposition is too indiscriminating. The wife's right to use the premises in conducting her personal affairs and authorized family business does not include power to turn her husband's possessions over to those seeking evidence against him even though he has not given permission by word or deed and even though the police could

easily request his permission. The two uses of the property by the wife are utterly different; the authority for one use does not include the other.

The importance of distinctions based upon the purpose of the entry has already been recognized in the law of search and seizure. In *Stoner v. California*, 376 U.S. 483, the hotel employees undoubtedly had express or implied authority to enter Stoner's hotel room in the performance of their normal duties but, even as a matter of property law, that authority would not have carried with it the right to invite the police into the room for the purpose of finding evidence. Similarly, in *Chapman v. United States*, 365 U.S. 610, the owner of the house, who authorized the search, had authority to enter for a number of purposes, such as to view waste, but it did not include the right to take police officers into the building for the purpose of searching for a distillery. Similarly, Mrs. Coolidge's authority to admit police officers seeking her testimony did not include the right to surrender the security of her husband's personal possessions.

4. The court below held that the search of petitioner's automobiles and seizure of his belongings did not violate the Fourteenth Amendment because a search and seizure with the wife's consent is not "unreasonable" (App. 219-220). This approach, even though mistaken, has at least the virtues of intellectual accuracy and candor. Plainly, there was no waiver in the customary sense of an "intentional relinquishment of a known constitutional right or privilege" (*Johnson v. Zerbst*, 304 U.S. 458, 464). Equally, plainly, Coolidge did not convey to either his wife or the police the impression that, even though his permission could be readily requested, he had given her authority to dispense with the request and permit a search for, and seizure of, evidence against him. No rule of agency or property law gives the wife analogous authority in other transactions. Consequently, if a wife merely because of the marital relation and her presence on the premises has power to validate

a search for evidence against her husband among his personal effects by the very officials who hold him in custody, that power must derive from some rule of constitutional law made by this Court rather than from any consensual manifestation or principle of property. And the rule would have to be that the will of the wife is enough to make "reasonable" an otherwise "unreasonable" official intrusion into her husband's affairs. In effect, the will of the wife, based upon whatever fear or vagary might move her, would substitute for an impartial judicial determination of probable cause.

We submit that the Court should reject this proposition.

In the first place, a decision that the wife's consent makes a search without a warrant "reasonable" within the Fourth Amendment would be inconsistent with the now well-established principle that a search and seizure without a warrant issued upon probable cause is unreasonable as a matter of law, unless justified by exigent circumstance. *McDonald v. United States*, 335 U.S. 451, 455-456; *Jones v. United States*, 357 U.S. 493, 499; *Chapman v. United States*, 365 U.S. 610. The older view followed by the court below which accorded no preference to a warrant but looked only to an ultimate determination of reasonableness, has been repudiated. See, *e.g. Chimel v. California*, 395 U.S. 752, overruling *United States v. Rabinowitz*, 339 U.S. 56. It is settled that "the 'general requirement that a warrant be obtained' is basic to the Amendment's protection of privacy, and 'the burden is on these seeking an exemption to show the need for it'." Justice Harlan dissenting in *Chambers v. Maroney*, No. 830, October Term 1969, 38 U.S. Law Week 4547, 4550, 4552.[20]

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[20]Commonwealth v. Cabey, 30 Pa. D. & C.2d 753 (1963), affirmed by an equally divided court, 201 Pa. Super. 433, 193 A.2d 663 (1963), cert. denied, 380 U.S. 926, is an excellent example of the extent to which many State and lower federal courts have held the wife's consent effective to validate an otherwise unlawful search and seizure under the misapprehension that the only question was whether

Second, vesting power in the wife to surrender her husband's effects to the police is inconsistent with the settled policy of the law towards marital relations. For a wife to assist the police is likely, after the event, to have a disruptive effect upon the marriage. Before the event, the cautious and knowledgeable husband concerned about his privacy would be under pressure to conceal from his wife any papers and effects that prying officials might seek to scrutinize or use against him. Concealment also strains marital relations. To avoid these consequences, the federal courts have long disqualified a wife from testifying against her husband unless both partners consent. *Hawkins v. United States*, 358 U.S. 74, 77-78. The same considerations should be given force in developing the law of search and seizure. Comment, *The Effect of a Wife's Consent to a Search and Seizure of the Husband's Property*, 69 *Dick. L. Rev.* 69 (1964).

Third, permitting a wife to consent to the search and seizure of her husband's property is bound to have capricious consequences. The ignorant or frightened wife is likely to give her consent because, like Mrs. Coolidge, she "thought I had to" (App. 94). The knowledgeable wife devoted to her husband will shut the door on the police, telling them that since they hold the husband in custody they have only to ask his permission and let him decide for himself. The jealous or angry wife may welcome the opportunity for vengeance. With diverse motives determining the decision, it is highly improbable that the wife's willingness to turn her husband's papers or belongings over to the police on any particular occasion would correlate affirmatively with any objective justification for the search.

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the police had acted reasonably. In the *Cabey* case the search for and seizure of a revolver was held "reasonable" partly because the accused owner had been taken into custody a short time earlier and partly because of the wife's consent.

Fourth, such a rule opens the door to intimidation and other forms of pressure upon the wife that cast grave doubt upon the voluntary character of her assent. *E.g., Amos v. United States*, 255 U.S. 313. The present case furnishes a strong example. The Trial Court found that "Mrs. Coolidge intended to cooperate with the police in every way and to furnish them freely with both information and guns in order, so she stated, to clear her husband of any suspicion" (App. 186-187, 201). But the circumstances under which that intent was formed are highly significant. Mrs. Coolidge had "no knowledge of any constitutional rights, either by explanation of the police or otherwise" (App. 186, 201). She was "an extremely thin, nervous woman . . . more nervous than a normal person of her age" (App. 187, 202). The two police officers came to the house, without prior warning. They immediately directed Mrs. Coolidge's mother-in-law to leave the house, thus isolating Mrs. Coolidge. Next, they told Mrs. Coolidge that her husband was "in serious trouble" and would not be coming home (App. 93). Only that afternoon a senior officer of the Manchester police had ordered her to "cooperate with" the police, saying that if she "withheld any information he could give me a prison sentence" (App. 92). It is hardly surprising that Mrs. Coolidge "felt that I had to" comply with the officers' request for the guns (App. 94). Viewed most favorably to the State, the consent was that of a highly nervous woman ignorant of constitutional safeguards, alone at night with officialdom, whose husband was in serious trouble and who had been warned that she could go to prison if she failed to cooperate.

We need not argue whether such consent is voluntary or coerced.[21] To treat any wife's acquiescence in police de-

[21] Many federal and State decisions indicate that such official pressure as was present here is sufficient to invalidate the wife's consent. *E.g.*, Amos v. United States, 255 U.S. 313; Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959); Fitter v. United States, 258 Fed. 567 (2d Cir. 1919); People v. Haskell, 41 Ill.2d 25, 241 N.E.2d 430 (1968); Duncan v. Commonwealth, 198 Ky 841, 250 S.W. 101 (1923);

mands for her husband's personal effects as a substitute for the judgment of a magistrate creates too great a risk of putting the privacy of a man's papers and effects at the mercy of official pressure upon a frightened and uninformed spouse.

Fifth, the sole effect of such a rule, in a case like the present, is to legitimatize searches and seizures without a warrant when the husband would withhold his consent. Here the husband was in custody. The police could easily have asked for his permission to inspect his guns and automobiles and to take any personal items for laboratory tests. Even if they had started to the house without the intention of procuring the articles, they had only to ask Mrs. Coolidge's permission to telephone the police station. If petitioner had given consent, then the police could have gone forward without a warrant.[22] In fact, the police, thoughtlessly or perhaps deliberately, gave petitioner no opportunity to express his will concerning the search of his belongings. To require the police to ask puts them to no trouble when the husband would assent. It would affect their investigation if the husband would withhold consent. To adopt a rule that the husband need not be asked when he is available would thus serve no purpose except to allow

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State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936); Carignano v. State, 31 Okla. 228, 238 Pac. 507 (1925); Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930); State v. Bonolo, 39 Wyo. 299, 270 Pac. 1065 (1928).

[22] If he had refused, surely that should have ended the question until a magistrate determined whether there was probable cause. Despite one contrary decision (People v. Smith, 183 C.A.2d 670, 6 Cal. Reptr. 866 (1960)), we cannot believe that this Court would seriously entertain the proposition that a wife's acquiescence in a search and seizure of her husband's personal papers and effects is enough to satisfy the Fourth Amendment in the face of the husband's objection.

the police to use the wife's consent, if they can obtain it, for the very purpose of circumventing the constitutional protection her husband would want to assert.

In sum, we suggest that determining the effect of a wife's consent upon her husband's claims under the Fourth and Fourteenth Amendments requires more discriminating analysis than is found in many lower court opinions. In this case, the Court need decide no more than that, when the husband is readily available to decide for himself, a search of his personal papers and effects for the purpose of seeing whether they will supply evidence against him, made without a warrant, is not validated by the acquiescence or assent of his wife. That much, we submit, is the minimum the constitutional safeguards require.

CONCLUSION

The judgment of the Supreme Court of New Hampshire should be reversed for either or both of the foregoing reasons.

Respectfully submitted,

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